STATE OF MICHIGAN

IN THE SUPREME COURT

PATRICIA MERCHAND,

Plaintiff-Appellee,
v

SC No. 154622
COA No. 327272
LC No. 12-1343-NH
(Ingham Circuit Court)

RICHARD L. CARPENTER, M.D.,

Defendant-Appellant,
and

MID-MICHIGAN EAR, NOSE, AND THROAT, P.C., a domestic professional service corporation, jointly and severally,

Defendant.
_____/

DEFENDANT-APPELLANT'S REPLY SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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THE MEDICAL RECORDS AND TESTIMONY SOUGHT TO BE ADMITTED BY PLAINTIFF WERE NOT ADMISSIBLE UNDER MRE 404(b).

Defendant-Appellant Richard L. Carpenter, M.D. ("Dr. Carpenter" or "Defendant") files this brief in reply to the Supplemental Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal, dated December 8, 2017, filed by Plaintiff-Appellee Patricia Merchand ("Plaintiff").

Before addressing the actual supplemental argument presented by Plaintiff, Defendant notes that Plaintiff has provided this Court with over 30 pages of facts and proceedings which duplicate in most regards what Plaintiff submitted in opposition to the original application for leave to appeal, notwithstanding this Court's admonition that "[t]he parties should not submit mere restatements of their application papers." (Apx 00635a).

1. The actual other-acts evidence was not proffered to the trial court.

At pages 31-33 of her Supplemental Brief, Plaintiff contends that the testimony of Dr. Morris was sufficient to act as an offer of proof under MRE 103(A)(2). Plaintiff does not address Defendant's argument that the subject medical records and the anticipated testimony of the other patients/plaintiffs were necessary foundational items, without which the trial court could determine admissibility under MRE 703 and MRE 702.

Plaintiff's proffered case law authority is of no assist. In *Conlon v Dean*, 14 Mich App 415, 424; 165 NW2d 623 (1968), a panel of the Court of Appeals cited to former GCR 1963, 604, requiring that a specific offer of proof be made for purposes of preserving the record. The court acknowledged that the purpose of the rule was to provide the trial judge with the information he or she needs to rule intelligently, and also to provide the appellate court with the information it needs to pass on an allegation that the trial court ruled erroneously. Here, neither

objective was satisfied because absent the other patients'/plaintiffs' testimony and the actual records from which Dr. Morris formed his opinion, the trial court could not determine admissibility. To place this argument in context, assuming the trial court allowed such testimony, without the actual testimony in the actual records, how could Defendant intelligently and fairly respond at the time of trial? He could not. In turn, the offer of proof is insufficient because it does not allow the trial court information needed to "rule intelligently," as noted in *Conlon.*

Hes v Haviland Products Co, 6 Mich App 163; 148 NW2d 509 (1967) is fully distinguishable. In that case, the attorney summarized exactly what a witness would have said if the witness had been permitted to testify. Unlike this case, in *Hes* there was no need to establish a foundational basis for the witness's testimony (indeed, the witness was the plaintiff and he testified via special record what he would have claimed in compensation under an oral contract of employment).

More fundamentally, admissibility of the evidence sought to be admitted under MRE 404(b)(1) for "other purposes," such as scheme, plan, or system, necessarily requires that the other patients'/plaintiffs' testimony be proffered into the record. Instead, the trial court was provided with an expert's opinion of scheme, plan, or system of doing an act, without regard to the actual evidence relied upon by the expert in support of this opinion. Absent this information, this Court cannot determine legitimately whether there is foundational information for Dr. Morris' opinion which satisfies MRE 404(b)(1).

As already addressed in Defendant's Supplemental Brief, assuming arguendo the offer of proof is sufficient, the information proffered does not satisfy MRE 404(b)(1). See Defendant's Supplemental Brief, pp 7-8.

2. The other-acts evidence is not logically relevant.

At pages 33-35 of her Supplemental Brief, Plaintiff does not address the preservation issue under MRE 404(b), addressed in Defendant's Supplemental Brief, page 4. The factual argument made by Plaintiff was not made in response to the defense motion in limine to exclude evidence regarding other malpractice allegations, as explained previously.

Nor does Plaintiff respond to the argument that the medical records of only two patients/plaintiffs at or shortly after the time of their surgeries involve nerve injuries, and even these medical records were irrelevant if, as Plaintiff's experts opined, the relevant symptomology would have manifested many months or years later. As Defendant explained: "The debate was more about ***when*** the more severe symptoms would manifest, not ***whether*** such symptoms, as manifested, would be documented." Defendant's Supplemental Brief, page 5.

3. Plaintiff did not establish legal relevance.

At pages 36-39 of her Supplemental Brief, Plaintiff argues that Dr. Morris' opinion on Dr. Carpenter's attention to detail during other patients' surgeries is admissible to show Dr. Carpenter's "knowledge of his own surgical ability, as well as motive." (*Id.* at p 36). Plaintiff does not connect Dr. Carpenter's supposed knowledge of his own surgical "deficiencies" with a theory of liability in this case. Restated, there is no claim that Dr. Carpenter distrusted his surgical abilities, such that his attention to detail regarding other patients' surgeries is somehow relevant or non-propensity evidence. See Defendant's Supplemental Brief, pp 5-6.

At page 38 of her Supplemental Brief, Plaintiff argues that "numerosity . . . is not required in the Rules of Evidence," and that the number of other acts goes to the weight not the admissibility of the other-acts testimony. No authority is cited for this position. As explained by Dr. Carpenter at page 7 of his Supplemental Brief, only two or three of the cases dealt with nerve injuries, which are hardly sufficient number to constitute a "scheme, plan, or system to do an

act" via other-acts under MRE 404(b)(1). Plaintiff has the burden of admissibility and no authority is cited for her position on this point.

4. MRE 403 analysis.

This is where Plaintiff's Supplemental Brief is the weakest. Plaintiff does not address let alone explain how the Court of Appeals Majority Opinion omitted altogether an analysis of the "prejudice" side of the MRE 403 balancing test. As previously explained, since balancing is imbedded in MRE 403, a court must analyze both sides of the scale—the probative side and the prejudicial side. Instead, Plaintiff argues that the probative side is "substantial" and that "[a]ny prejudice which would come of the admission of other acts evidence in this case is not unfair because there is little likelihood that the evidence would be given preemptive weight, particularly where instructed as to its proper use of the acts evidence during their [jurors'] deliberations." (Page 40). That's it. Plaintiff fails to address the prejudice and jury confusion explained by Defendant in his application for leave to appeal, pages 24-30. None of the cases discussed in those pages is addressed let alone distinguished by Plaintiff. In particular, Plaintiff fails to address any of the concerns found at pages 28-29 of Dr. Carpenter's Application for Leave to Appeal.[1] Plaintiff altogether fails to address the distinct probability of jury confusion by a series

[1] The Majority did not take into account any of the following considerations arising from Plaintiff's proposed introduction of introduce evidence of other patients' complaints regarding Dr. Carpenter's treatment in other cases:

a. Counsel for Dr. Carpenter would have been obligated to explore the individual circumstances of each surgery, including the applicable standard of care and each patient's symptoms, medical history, and outcomes.

b. The subset of patients chosen by Plaintiff to show inadequate recordkeeping—all plaintiffs—is inherently biased, bias which the defense would have the right to explore, spinning off into a series of mini-trials.

(cont'd next page)

of resulting "mini-trials" involving whether Dr. Carpenter supposed had improper surgical technique and/or proper recordkeeping with respect to other patients/plaintiffs.

Plaintiff does not address the impracticality of a limiting instruction in these circumstances, found at page 30 of Dr. Carpenter's Application for Leave to Appeal. As summarized there:

> "Telling the jury that it is not to consider the 'other patients' evidence when determining whether Dr. Carpenter breached the standard of care in this case would realistically do nothing to prevent juror's from drawing prejudicial inferences from the fact that other patients had sued Dr. Carpenter for medical malpractice."

(Application p 30).

Finally, the MRE 403 balancing test is one committed to the sound discretion of the trial court. The trial court's determination that prejudice and jury confusion substantially outweighed probative value falls within the range of principled outcomes. The trial court had observed the witnesses first hand, was familiar with evidence at the time of trial, could gauge how the jury was reacting to the evidence, and could determine the effectiveness of a limiting instruction

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> c. The medical records of 8-10 patient-plaintiffs reviewed by Dr. Morris did not constitute an adequate and indicative sampling of Dr. Carpenter's recordkeeping—they were cherry-picked from patients who had brought claims against Dr. Carpenter, and who were represented by counsel for Plaintiff (or related counsel) in then-pending cases against Dr. Carpenter. In turn, Defendant would have a right to bring in other patients, their charts, and their experiences, to balance out this biased sampling. However, as addressed next…
>
> d. How would Dr. Carpenter establish a proper representative sampling of patients in the midst of trial when the medical information is obviously privileged to the other non-plaintiff patients, and the defense does not have meaningful access to such a list of such other patients?

given the abject danger presented by the propensity nature of Dr. Morris' testimony, let alone by the necessary information that would have to be submitted by Defendant to rebut his testimony.

RELIEF

WHEREFORE, Defendant-Appellant requests this Court reverse the Majority Opinion, adopt the Dissenting Opinion, instruct that the Judgment of No Cause of Action be reinstated, in the alternative reverse and remand to the Court of Appeals for consideration of issues other than the other-acts issue and res ipsa loquitur issue, and in the second alternative reverse on the res ipsa loquitur ruling and remand to the trial court for further proceedings.

Respectfully submitted,

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Dated: January 5, 2018

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PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Monique M. Vanderhoff, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on January 5, 2018, she caused to be served a copy of Defendant-Appellant's Reply Supplemental Brief in Support of Application for Leave to Appeal and Proof of Service/Statement Regarding E-Service upon:

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